UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

NETLIST, INC.,	
Plaintiff,))
VS.) Case No. 2:21-CV-463-JRG
SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC.,) JURY TRIAL DEMANDED))
Defendants.))

NETLIST INC.'S MOTION TO STRIKE PORTIONS OF THE REBUTTAL EXPERT REPORT OF PAUL K. MEYER

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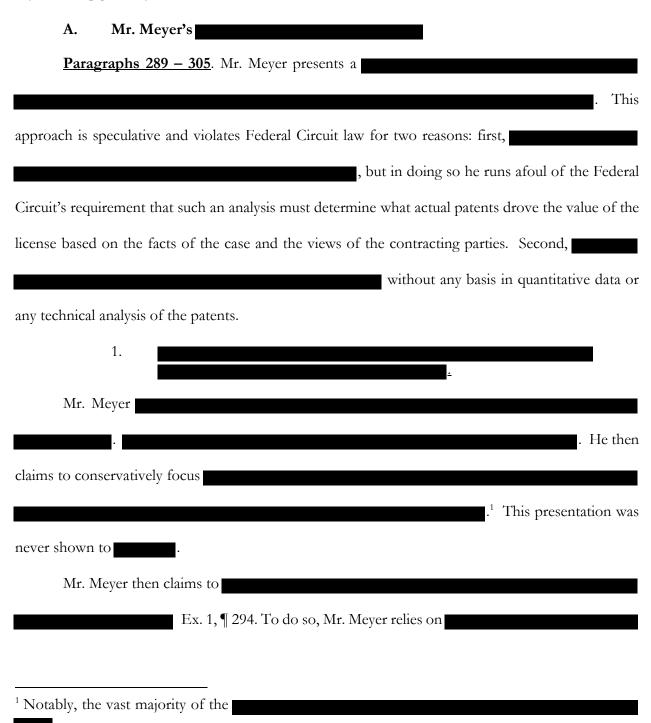
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I. INTRODUCTION

Plaintiff Netlist respectfully brings this motion to strike and exclude certain portions of the rebuttal report of the Samsung Defendants' expert Paul K. Meyer, attached as Ex. 1 hereto.

II. ARGUMENT



Fr. 1 at II 205. This analysis days modern sides the subset that the
Ex. 1 at \P 295. This analysis does not consider the value that the
parties to the license, assigned to Netlist's patents.
Federal Circuit law requires that, in analyzing a comparable license, an expert must "account
for differences in the technologies and economic circumstances of the contracting parties." Apple
Inc. v. Wi-LAN Inc., 25 F.4th 960, 971 (Fed. Cir. 2022) (emphasis added). In Apple, the Federal Circuit
held that there must be a factual basis to assign value to specific patents within a portfolio patent
license. Critically, this requires consideration of how the parties to the license "treated" the value of
the patents in question. Id. at 973; VirnetX, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1330 (Fed. Cir. 2014).
Mr. Meyer has performed no such analysis. Indeed, he does not identify which
. Indeed, to the contrary, Mr. Meyer's exhibits show that
. See Ex. 2 (Meyer
Attachment 18). In Apple, the Federal Circuit emphasized that the defect present in Mr. Meyer's
analysis is a threshold barrier to the presentation of the opinion, and is not simply cured by cross-
examination. <i>Id.</i> at *974.
2.
Mr. Meyer compounds his speculation by claiming to
. After
. 11101

² Netlist has also moved to strike this analysis from Mr. McAlexander's report as unreliable, unable to be replicated, and thus unscientific. To the extent the Court grants Netlist's motion to strike Mr. McAlexander's report, that is another basis to strike Mr. Meyer's opinion.

With respect to the DDR4/HBM Patents, Mr. Meyer and he does the same with respect to the DDR5
Patents. Ex. 1, ¶ 300. He then claims that
. These numbers are made up, but they are convenient; they allow Mr. Meyer to
To be clear, this additional step is not based on any alleged technical contribution, and it has no connection whatsoever to the Rather, Mr. Meyer
did two things. First, he determined
This opinion alone should be excluded because "its probative value is
substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the
issues, misleading the jury, undue delay, [or] wasting time." Fed. R. Evid. 403. Just informing the jury

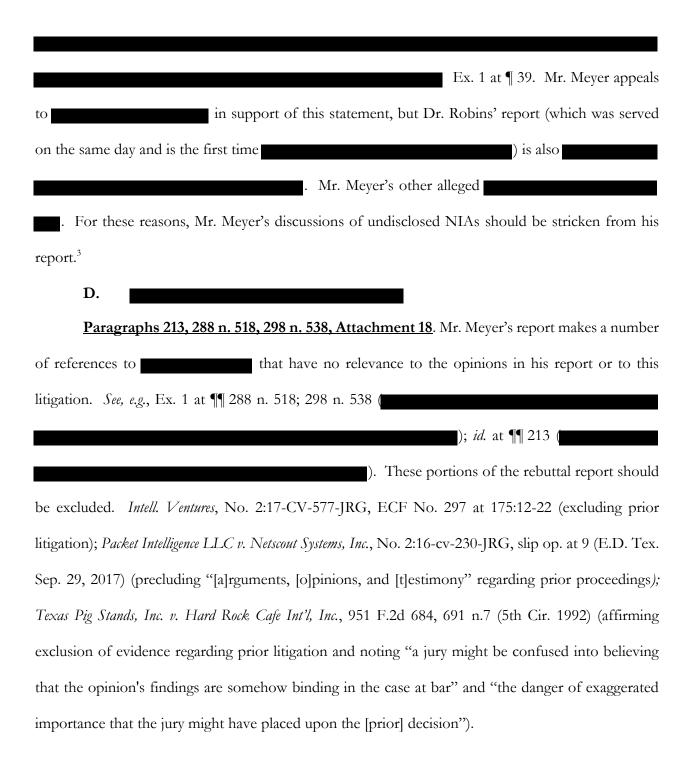
that would cause substantial juror confusion
and unfair prejudice, and would . As discussed below, courts in this
district routinely exclude evidence of other litigation and unasserted patents under Rule 403.
are not at issue in this lawsuit and have no relevance to a determination of the value
of the patents-in-suit to Samsung. Rembrandt Wireless Techs., LP v. Samsung Elecs. Co., No. 2:13-CV-213,
2015 WL 627430, at *1 (E.D. Tex. Jan. 31, 2015) (granting Plaintiff's motion in limine to exclude
evidence of "litigation brought by [Plaintiff] unrelated to the patents-in-suit").
Second, Mr. Meyer reviewed ——which again was created
before any of the patents-in-suit even existed—and opined that
Ex. 1, ¶ 298-99. This halving of value in the guise of
"apportionment" is junk science. It has no connection to the facts of the case and is not based on
"apportionment" is junk science. It has no connection to the facts of the case and is not based on
"apportionment" is junk science. It has no connection to the facts of the case and is not based on any scientific, economic, or technical analysis; it is made up and speculative. The Federal Circuit
"apportionment" is junk science. It has no connection to the facts of the case and is not based on any scientific, economic, or technical analysis; it is made up and speculative. The Federal Circuit prohibits numbers "plucked out of thin air" masquerading as quantitative damages analysis.
"apportionment" is junk science. It has no connection to the facts of the case and is not based on any scientific, economic, or technical analysis; it is made up and speculative. The Federal Circuit prohibits numbers "plucked out of thin air" masquerading as quantitative damages analysis. <i>LaserDynamics, Inc. v. Quanta Computer, Inc.</i> , 694 F.3d 51, 69 (Fed. Cir. 2012) (such "arbitrariness" "would
"apportionment" is junk science. It has no connection to the facts of the case and is not based on any scientific, economic, or technical analysis; it is made up and speculative. The Federal Circuit prohibits numbers "plucked out of thin air" masquerading as quantitative damages analysis. **LaserDynamics*, Inc. v. Quanta Computer*, Inc., 694 F.3d 51, 69 (Fed. Cir. 2012) (such "arbitrariness" "would alone justify excluding [expert]'s opinions"); **Biscotti Inc. v. Microsoft Corp.*, No. 2:13-CV-01015-JRG-
"apportionment" is junk science. It has no connection to the facts of the case and is not based on any scientific, economic, or technical analysis; it is made up and speculative. The Federal Circuit prohibits numbers "plucked out of thin air" masquerading as quantitative damages analysis. <i>LaserDynamics, Inc. v. Quanta Computer, Inc.</i> , 694 F.3d 51, 69 (Fed. Cir. 2012) (such "arbitrariness" "would alone justify excluding [expert]'s opinions"); <i>Biscotti Inc. v. Microsoft Corp.</i> , No. 2:13-CV-01015-JRG-RSP, 2017 WL 2536962, at *4 (E.D. Tex. May 18, 2017) (observing that Federal Circuit has
"apportionment" is junk science. It has no connection to the facts of the case and is not based on any scientific, economic, or technical analysis; it is made up and speculative. The Federal Circuit prohibits numbers "plucked out of thin air" masquerading as quantitative damages analysis. <i>LaserDynamics, Inc. v. Quanta Computer, Inc.</i> , 694 F.3d 51, 69 (Fed. Cir. 2012) (such "arbitrariness" "would alone justify excluding [expert]'s opinions"); <i>Biscotti Inc. v. Microsoft Corp.</i> , No. 2:13-CV-01015-JRG-RSP, 2017 WL 2536962, at *4 (E.D. Tex. May 18, 2017) (observing that Federal Circuit has consistently excluded "expert testimony that applies general economic theorems or rules of thumb

, but Netlist could not have
because they did not exist yet.
В.
Throughout Mr. Meyer's report, he claims that
. See, e.g., Ex. 1 at ¶¶ 45, 209-210, 239,
262, n. 504, 306-311. This is wrong, and allowing Mr. Meyer to tell this to the jury would be confusing,
prejudicial, and contrary to the facts of the case.
As Mr. Meyer states in his report,
Ex. 1 at ¶ 43. Samsung has repeatedly contended and still
contends in this case, however, that
served an interrogatory to Samsung seeking the following: "With respect to each asserted claim of
Netlist Patents-in-Suit, identify whether it is or is not an "Essential Patent Claim" as defined in JEDEC
Manual of Organization and Procedure JM21T (September 2020) § 8.2.1, and Set Forth Your
Complete Basis for that conclusion." Ex. 3 at 109. "Essential Patent Claim" is defined by JEDEC as
"Those Patent claims the use of which would necessarily be infringed by the use, sale, offer for sale
or other disposition of a portion of a product in order to be compliant with the required portions of
a final approved JEDEC Standard." Ex. 4 at 23. Samsung's response was unequivocal:
Ex. 3 at 111. Likewise, in Netlist's final supplemental interrogatory response
on the issue after completing its technical analysis Netlist stated

Ex. 5 (Plaintiff Netlist, Inc.'s Second Supplemental Responses And
Objections To Defendants' First Set Of Interrogatories) at 47-48.
Samsung wants to have it both ways: it wants to tell the jury that
, but also that Samsung is
This is confusing, prejudicial, and contradictory, and will
necessitate a sideshow on essentiality that neither side plans to address. Netlist's experts will not argue
that the patents are . Instead,
Netlist will show on an element by element bases why Samsung's specific accused designs infringe.
In other words, the jury will not make a determination of whether the patents-in-suit are
the jury will only determine whether Samsung infringes and how much Samsung owes
in damages for its infringement.
C.
Paragraphs 95-102, 162-166: Mr. Meyer identifies
. Netlist served an interrogatory asking Samsung to identify any
alleged non-infringing alternatives ("NIAs"). Ex. 6, at 11. (Netlist's June 8, 2022 Interrogatory #8),
("For each Netlist Patent-in-Suit, identify and describe in detail any alleged non-infringing alternative
("For each Netlist Patent-in-Suit, identify and describe in detail any alleged non-infringing alternative that You contend exists or existed to each Netlist Patent-in-Suit"). Samsung provided
that You contend exists or existed to each Netlist Patent-in-Suit"). Samsung provided
that You contend exists or existed to each Netlist Patent-in-Suit"). Samsung provided to Netlist's first set of interrogatories, but
that You contend exists or existed to each Netlist Patent-in-Suit"). Samsung provided to Netlist's first set of interrogatories, but See Ex. 3, at 115. (Samsung's Dec. 22, 2022 Supp. Interrogatory Response)
that You contend exists or existed to each Netlist Patent-in-Suit"). Samsung provided to Netlist's first set of interrogatories, but See Ex. 3, at 115. (Samsung's Dec. 22, 2022 Supp. Interrogatory Response) at 115). Netlist also deposed

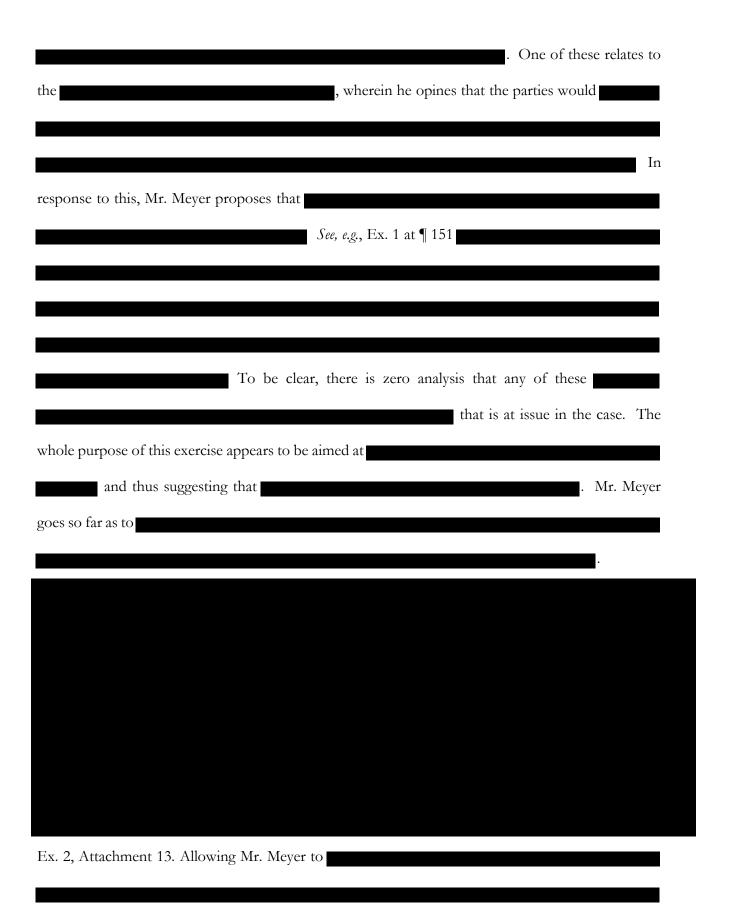
); Ex. 8 (Kyungsoo Park Depo.) at 64:	17-65:2 (
); Ex. 9 (Sungjoo Park Depo.) at	85:9-17 (

Courts in this district routinely strike non-infringing alternatives that are not disclosed during the fact discovery period and are only disclosed for the first time in rebuttal reports. See, e.g., Nanology Alpha LLC v. WITec Wissenschaftliche Instrumente und Technologie GMbH, 2018 WL 4289342, at *5 (E.D. Tex. July 11, 2018) ("the Court finds that WITec's failure to disclose these alternatives until after the close of fact discovery would significantly prejudice Plaintiff and is not substantially justified."); Realtime Data LLC v. EchoStar Corp., 2018 WL 6266300, at *7 (E.D. Tex. Nov. 15, 2018) (striking portions of expert report where "Defendants never properly disclosed...non-infringing alternatives"); Ericsson Inc. v. TCL Commun. Tech. Holdings, Ltd., 2017 U.S. Dist. LEXIS 183216, at *37-47 (E.D. Tex. Nov. 4, 2017) (striking portions of an expert report related to NIAs not disclosed in response to an interrogatory). In Nanology, the court held that the "WITec's failure to disclose these alternatives until after the close of fact discovery would significantly prejudice Plaintiff and is not substantially justified." Id., at *5. The court further held that "the importance of the alternatives is minimal," as the expert "does not explain in his rebuttal report how the [NIAs] are non-infringing, or provide any information on the cost or availability of these alternatives." Id. Here too, Mr. Meyer does not explain how any of the I. As an example, he claims that



Netlist is moving to strike the discussion of these. To the extent those discussions are stricken, that provides another basis to strike these statements from Mr. Meyer's report.

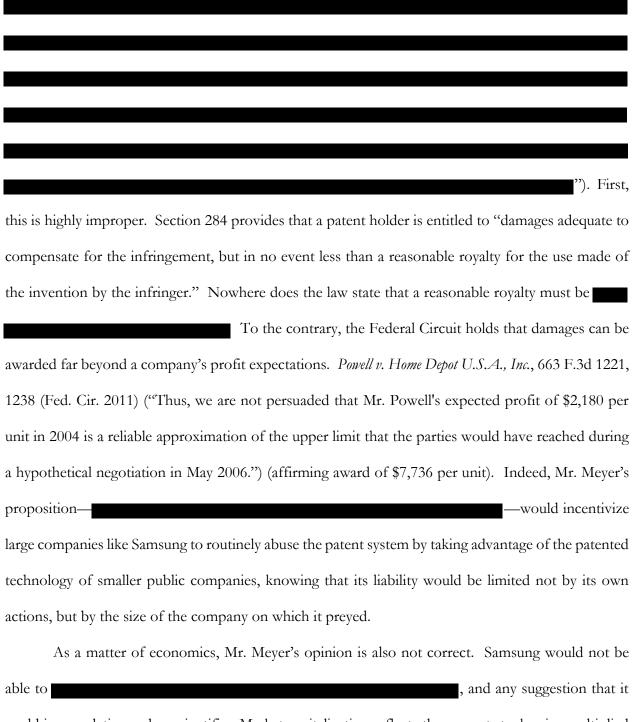
E.
Paragraphs 126, 129, 141-144, 149-155. Mr. Meyer repeatedly refers to the
Ex. 1 at ¶ 126. Mr.
Meyer purports that these But neither
Mr. Meyer, nor Mr. Halbert
. Nor does Mr. Meyer identify the
, or whether any of these
. Mr. Meyer states that "
" Ex. 1 at ¶ 144. There is no relevance to this statement and no connection to the patented
technology in this case; Mr. Meyer solely wishes to inform the jury that because
tooliniology in time case, the file society wishes to inform the jury time sectase
The Court has explained previously that where there is reference to thousands of contributions
or patents to a particular standard, but there is no "internal subdivision to put what actually is at issue
here into a narrower comparison," but instead simply "just the global there are tens of thousands
contributed to the standard as a whole without any attempt to differentiate the various parts of the
standard," then "the implication that [the asserted patent] is only one of tens of thousands and,
therefore, not important, not valuable, is so difficult to avoid it probably does need to be struck."
Optis Wireless Tech., LLC v. Apple Inc., No. 2:19-cv-066-JRG, Dkt. 437 (Pretrial Hearing) at 89:3-24.
F.
Paragraphs 150-156, Attachment 13. After identifying the



in this case is highly prejudicial and has no connection to the facts of this case. Fed. R. Evid. 403.

G. Paragraphs 210, 311, Table 13. On June 8, 2022, Netlist sent Samsung a The document, on its face, states " " Ex. 10 Rule 408 precludes introducing a settlement offer to "prove or disprove the validity or amount of a disputed claim." Fed. R. Evid. 408(a). Mr. Meyer and thus directly violates Rule 408. Ex. 1 ¶ 211 (" "). Using a in this way is legally improper, prejudicial, and should be stricken from Mr. Meyer's report. Maxell, Ltd. v. Apple Inc., 2020 WL 8269548, at *15 (E.D. Tex. Nov. 11, 2020) (holding that the expert "is prohibited from providing testimony that relies upon the prior offers in calculating a reasonable royalty" under Rule 408 where the communications were marked as "for settlement purposes only"); see also Cybergym Rsch. LLC v. ICON Health & Fitness, Inc., 2007 WL 9724238, at *5 (E.D. Tex. Oct. 7, 2007) ("[The] expert report is excluded to the extent he relied on the offers made in the course of licensing or settlement negotiations ...in his calculation of reasonable royalty."). H. Paragraph 210, Table 13. Mr. Meyer's report directly discusses an . Ex. 1¶ 210 ("

."). This statement, and the table following it, is wholly irrelevant to this case. First,
. Ex. 11, at
603. ("
."). The DDR4 LRDIMM patents in this case did not even issue until 2020 and
2021. Dkt. 1-1 ('506 Patent) (issued Dec. 8, 2020); Dkt. 1-2 ('339 Patent) (issued Mar. 16, 2021). Mr.
Meyer does not even attempt to explain
. Second,
the .
In this case, on the other hand, Samsung is asserting that the patents-in-suit are not essential. Netlist
will prove infringement based on a technical analysis of the accused products, irrespective of any
standards. Samsung is not entitled to a
irrelevant to the calculation of damages in this case. Third,
any discussion of will be confusing to the jury, prejudicial, and open the door to
that has no connection to this case. As discussed above, any discussion of
should be stricken from Mr. Meyer's report.
I.
Paragraphs 270-271, Table 16. Mr. Meyer compares M
. In so doing,
he suggests that Netlist's
See ¶ 271 ("



company executive) is unable to freely sell.⁴ This is one of the reasons FINRA recognizes that "Something important to keep in mind is that market cap is the perceived value of a company because stock price is determined by investors. It isn't necessarily the actual value of a company and all of its parts."5 Second, Mr. Meyer is It is a basic principle of economics that when stock purchases increase, the price of the stock increases along with it. It would be highly prejudicial for Mr. Meyer J. Paragraph 195. Mr. Meyer states that ." Ex. 1¶ 195. Mr. Meyer further states that Samsung has " " and that they are " " Id. are irrelevant to any decision the jury will make in this case and will only serve to confuse the jury. This is especially true where Samsung Indeed, Netlist specifically asked Samsung's See, e.g., Ex. 10 (Sungjoo Park Transcript) at 34:20-25 (

⁴ https://www.finra.org/investors/insights/market-cap. ("Market capitalization, or market cap, is one measurement of a company's size. It's the total value of a company's outstanding shares of stock, which include publicly traded shares *plus restricted shares held by company officers and insiders.*") (emphasis added).

⁵ *Id*.

⁶ https://www.investopedia.com/terms/m/marketcapitalization.asp, ("If there is a high demand for its shares due to favorable factors, the price would increase.").

) (objections omitted); Ex. 13 (Hyun Joong Kim Dec. 6, 2022 Transcript)
at 50:20-23 (
).
K.
Paragraph 26. In paragraph 26, Mr. Meyer claims that
This statement is irrelevant, prejudicial, and will be confusing to the jury.
Rather, the accused
products are
Mr. Meyer should not be allowed to tell the jury that
and claim it has any relevance to this case.

Dated: February 3, 2023

Respectfully submitted,

/s/ Jason G. Sheasby

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CERTIFICATE OF SERVICE

I hereby certify that, on February 3, 2023, a copy of the foregoing was served to all counsel of

record.

<u>/s/ Yanan Zhao</u> Yanan Zhao

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that the foregoing document and exhibits attached hereto are authorized to be

filed under seal pursuant to the Protective Order entered in this Case.

/s/ Yanan Zhao

Yanan Zhao

CERTIFICATE OF CONFERENCE

I hereby certify that, on February 2, 2023 counsel for the parties met and conferred on the

issues raised in this motion. Counsel for Samsung confirmed that Samsung did not intend to withdraw

any of its expert reports, or any portions of its expert reports, and that Samsung would oppose any

motions to strike portions of its expert reports.

/s/ Yanan Zhao

Yanan Zhao

Netlist's Motion to Strike Meyer Rebuttal Report No. 21-cv-463-JRG (E.D. Tex.)

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